

Protest of) Date: March 13, 1992
NEIL GARDIS & ASSOCIATES, INC.)
Solicitation No. 565480-92-A-0003) P.S. Protest No. 92-08

DECISION

Neil Gardis & Associates, Inc. ("Gardis"), protests the award of a construction contract for demolition of miscellaneous conveyors at the Milwaukee General Mail Facility ("GMF") to any offeror other than itself, the apparent low offeror. Gardis contends that the contracting officer improperly rejected its proposal for Gardis' stated unwillingness to produce performance and payment bonds required by the solicitation.

Solicitation No. 565480-92-A-0003 was issued by the Milwaukee Support Services Office ("SSO") on November 10, 1991, with a proposal due date of December 12. The solicitation called for the demolition and removal of certain ceiling-mounted conveyors on the third floor of the GMF. The Schedule of the solicitation notified offerors that a 100% performance bond and a 50% payment bond were required. The solicitation further provided:

Any offeror awarded a contract as a result of this solicitation will be required to submit a performance bond in a penal amount equal to 100 percent of the contract price, within the time specified by the contracting officer. [Section K.8 a.]

Any offeror awarded a contract as a result of this solicitation will be required to submit a payment bond in the penal amount set forth in the Schedule [50%], within the time required by the contracting officer. [Section K.9 a.]

Section M of the solicitation, Evaluation and Award Factors, provided that award of the contract would be made to the responsible offeror whose proposal conformed to the requirements of the solicitation and was most advantageous to the Postal Service.

Seventeen proposals were received, including an offer from Gardis. Because of the wide range of prices offered to perform the contract, the contracting officer requested offerors to submit best and final offers ("BAFO's") by December 31. The letter requesting BAFO's, sent December 20, specifically reminded offerors that performance and payment bonds were required, that Department of Labor Wage Rates (as quoted in the solicitation) were applicable, and instructed offerors to reevaluate their price proposals for accuracy.

After the original offers were submitted but before the request for BAFO's had been

issued, Gardis spoke with the project manager by telephone. The contracting officer's statement and Gardis' version of the telephone contact differ. The contracting officer indicates that Gardis telephoned the project manager and inquired about the status of the solicitation and when award of the contract was anticipated. The project manager responded that proposals were still under evaluation; that upon completion of the evaluation, the tentative low price offeror would be required to submit financial documents and references; if the offeror proved to be financially sound and had positive references, a letter of intent to award the contract would follow, requesting that performance and payment bonds be obtained prior to award. Gardis informed the project manager that it had not included bonds in its offer and would have to withdraw its offer if bonds were required.

Gardis' response to the contracting officer's statement asserts that the project manager telephoned Gardis on December 19 to inform it that it was the apparent low offeror and requested verification of the proposal price. Substantive issues of contract performance were discussed. The project manager asked how long Gardis' bonding company would need to generate the required bonds. Gardis indicated that bonds were not required since its offer was below \$25,000 and that no bonds would be furnished. The project manager stated that it was his understanding that the bonds were nevertheless required but said he would investigate the matter. He asked Gardis to forward its experience record and financial statements to the Postal Service and told Gardis that he would inform it of his findings.

Fourteen proposals were received in response to the request for BAFO's. Gardis sent a letter reconfirming its previously submitted price and stating that, "we are also aware of the requirement for performance and payment bonds on construction contracts exceeding \$25,000, per 39 U.S.C. ['] 410 (b)(4)(B)."^{1/} The contracting officer concluded from this statement, together with the telephone conversation the project manager had with Gardis, that Gardis did not intend to produce bonding as required by the solicitation.

After consulting the Postal Service's Procurement Manual ("PM") and legal counsel regarding the propriety of requiring bonds for contracts priced below \$25,000, and determining this requirement was properly within the discretion of the contracting officer, the contracting officer notified the second low offeror, Deconstruction, Inc./AI's Wrecking ("Deconstruction"), of the Postal Service's intent to award it the contract. The contracting office received Deconstruction's performance and payment bonds on January 31, 1992. The contracting officer awarded Deconstruction the contract on February 1; sent Deconstruction a combined Award/Notice to Proceed letter on February 3; and sent letters notifying unsuccessful offerors of the award on February 3.

^{1/} Title 39 U.S.C. ' 410 deals with application of federal laws to the Postal Service. The Postal Service is subject to the Miller Act, 40 U.S.C. ' 270a, which requires performance and payment bonds for any public contract for construction, alteration, or repair, which exceeds \$25,000. The Miller Act expressly provides that it does not "limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a)" of the Miller Act. 40 U.S.C. ' 270a (c).

Gardis' protest was originally sent to the General Accounting Office, which forwarded it to this office, where it was received on February 10. Gardis contends that the solicitation and Postal Service regulations prohibit the requirement of bonds for contracts under \$25,000. The protester further contends that it is fully capable of completing the job and, in support thereof, has attached a list of the major contracts Gardis has completed. Gardis requests that the contracting officer be directed to rescind the contract awarded to Deconstruction and to award the contract to Gardis.

The contracting officer submitted a report in response to this protest. He states that the Postal Service's estimate for this project was \$83,950.00. Pursuant to PM sections 7.1.3 a. and 7.1.4 a., which require performance and payment bonds for construction contracts exceeding \$25,000, the solicitation required such bonds. The contracting officer points out that section M of the solicitation, Evaluation and Award Factors, required the proposal receiving contract award to conform to the requirements of the solicitation. The contracting officer determined that bonds were required for all proposals, regardless of price, and that bonds were in the best interest of the Postal Service because they would ensure timely completion of the project.

The protester responded to the contracting officer's report with additional contentions. Gardis reiterates that only solicitations for contracts over \$25,000 may require bonding and states that the contracting officer errs in using the Postal Service's own cost estimate rather than the individual proposal price as the basis for determining when bonds are necessary. Gardis states that the contracting officer did not need to waive the bond requirements with regard to its proposal since bonds aren't required for construction contracts costing under \$25,000. The protester argues that a liquidated damages provision in the solicitation would have better ensured timely completion of the contract work than the bond requirement.

Gardis questions the contracting officer's assertion that time was of the essence, stating that the contracting officer did not award the contract until the 50th day of the 60 day period during which offers are open for acceptance. The protester believes that the contracting officer deliberately delayed award of the contract, and avoided any communication with the protester during this period, to prevent Gardis from filing a protest before the award. The protester asserts that the contracting officer has failed to address why he decided that "a contract award to [Gardis] would preclude timely performance." Gardis asserts, essentially, that bonds were unnecessary if Gardis had been selected for contract award because Gardis would have timely completed the project. Gardis questions why its twenty-year record of successfully completing federal projects was not sufficient to persuade the contracting officer of the advantageousness of its offer.

DISCUSSION

We must evaluate the timeliness of Gardis' protest as this office may not consider protests which are untimely filed.^{1/} Failure to file a protest in accordance with our

^{2/} Although no party to this proceeding has raised the issue of timeliness, we may do *sua sponte* because it affects the jurisdiction of our office to adjudicate Gardis' claim. Coopers & Lybrand, P.S. Protest No. 89-91, March 21, 1990; see Pitney Bowes, Inc., On Reconsideration, P.S. Protest No. 89-86, January 30, 1990; Evergreen International Airlines, Inc., On Reconsideration, P.S. Protest No. 86-07, June 9, 1986.

timeliness requirements mandates that the protest be dismissed. Holmes Construction Co., Inc., P.S. Protest No. 92-02, February 25, 1992; Montgomery Elevator Co., P.S. Protest No. 90-5, March 9, 1990.

In complaining that the bonding requirement should not apply to Gardis, the protester is alleging that the terms of the solicitation are deficient, since the solicitation made no distinction in bond requirements based upon the proposal price offered. See Good Food Service, Inc., P.S. Protest No. 88-21, April 8, 1988. "Protests based upon alleged deficiencies in a solicitation that are apparent before the date set for the receipt of proposals must be received by the date and time set for the receipt of proposals." PM 4.5.4 b. See Canteen Service, Inc., P.S. Protest No. 90-68, November 15, 1990. The bond requirement was unambiguously and prominently stated in the solicitation.

Since any protest would have had to have been received by this office by December 12, the original due date for proposals, the protest is untimely.^{1/}

The protest is dismissed.

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

^{3/} Had Gardis' protest been timely received, it would have been denied. Neither the Miller Act nor Postal Service regulations prohibit a contracting officer from requiring payment and performance bonds for a construction contract in the amount of \$25,000 or less. Given the unequivocal requirement in the solicitation that bonds be provided, Gardis was not at liberty simply to disregard the requirement based on its interpretation of the relevant regulations. See Gatto-Viktor, P.S. Protest No. 88-05, February 9, 1988; Universal Contracting, P.S. Protest No. 80-47, October 30, 1980. Gardis' remedy would have been to seek written clarification prior to submission of its proposal and, if not satisfied with the response of contracting officials, immediately to have filed a protest.